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No 00-1293
In the Supreme Court of the United States

JOHN ASHCROFT, Petitioner

v.

AMERICAN CIVIL LIBERTIES UNION, et al.,
Respondents

On Writ of Certiorari
to the U.S. Court of Appeals for the Third Circuit

BRIEF *AMICI CURIAE* OF THE SOCIETY FOR THE SCIENTIFIC STUDY OF SEXUALITY, THE INSTITUTE FOR ADVANCED STUDY OF HUMAN SEXUALITY, THE SEXUAL HEALTH NETWORK, THE AMERICAN BOARD OF SEXOLOGY, THE NATIONAL COALITION AGAINST CENSORSHIP, AND THE FIRST AMENDMENT PROJECT, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are organizations devoted to intellectual freedom and to scholarship and education in the field of human sexuality. They are concerned about the impact of the Child Online Protection Act (COPA) on their ability, and the ability of others involved in sexuality research and advocacy, to communicate, educate, and exchange information on the World Wide Web. They are additionally concerned that censorship not be imposed on this vital new medium because of the mistaken assumption that minors are harmed by exposure to material with sexual content. They submit this brief in order to assist the Court in determining whether the government has met its burden of establishing a compelling interest in suppressing sexual communications on the Web.[1]

STATEMENT OF THE CASE

COPA criminalizes any communication "for commercial purposes" by means of the World Wide Web if it "is available to any minor" and "includes any material that is harmful to minors." 47 U.S.C. 231(a)(1)(Supp. V 1999). It defines "harmful to minors" as any picture, writing, or other communication depicting or describing "an actual or simulated sexual act or sexual contact," or "lewd exhibition of the genitals or post-pubescent female breast," if it is "patently offensive" and "prurient" with respect to minors according to "contemporary community standards," and if it lacks "serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6) (Supp. V 1999). The legal standard is a variant on the one approved by this Court 33 years ago in the

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed pursuant to Rule 37.3 of the Rules of this Court. No part of this brief was written or financed by any party other than the *amici*. See the appendix for a description of the *amici*.

context of the sale of "girlie magazines" to a teenage boy. *Ginsberg v. New York*, 390 U.S. 629 (1968).

Seventeen publishers of sexual content on the Web challenged COPA in federal district court in Philadelphia. Following the precedent set in *Reno v. ACLU*, 521 U.S. 844 (1997), they argued primarily that COPA is overbroad because it essentially reduces the adult population of the Internet to reading and publishing only what is considered fit for children; they also asserted that the law is unconstitutionally vague and violates the First Amendment rights of older minors. The court held a preliminary injunction hearing at which a number of Web publishers testified regarding material on their Web sites that could be considered prurient, patently offensive, and lacking in value for minors according to the standards of some American communities.

For example, poems and stories posted on the Web site of the plaintiff A Different Light Bookstore describe adolescent and young adult sexuality in graphic terms. Jt.App. 610-12. Plaintiff Salon.com's "Sexpert Opinion" column by Susie Bright contains explicit descriptions of sexual acts. *Id.*, 617-20. The "Kama Sutra" screensaver from download.com "contains 40 explicit drawings based on the ancient Indian text on sexual pleasures and techniques." *Id.*, 642. The Sexual Health Network, which is directed to the sexual needs and concerns of disabled individuals, contains extensive material about sexual positions, sex toys, oral sex, and masturbation, in addition to contraception, fertility, erectile dysfunction, and numerous other sex-related subjects. *Id.*, 672-88; see also Cert. App. 63a-67a (district court's findings of fact).

Witnesses also testified that minors are an important part of their audience. Norman Laurilla of A Different Light Bookstore explained that its offerings are particularly helpful for gay and lesbian youth. Jt.App. 112. Dr. Mitchell Tepper

of the Sexual Health Network stated that although much of the information on the network's Web site could be helpful to minors, "I have to believe discussion of masturbation, oral sex, anal sex, descriptive positioning, all may be construed as 'pandering to the prurient interest of minors,'" in violation of COPA. *Id.*, 343. Thomas Reilly of plaintiff-Planetout.com testified that minors are welcomed on the site, even though "many people would find just being gay at all, harmful to minors in their definition of it," because the site "provides peer support, sexual health information and a place for self-expression for people who are questioning their sexuality or who are, in fact, gay or lesbian, bisexual, transgender and are teenagers." *Id.*, 355, 357, 363-54. Planetout also provides access to the sexually explicit Internet radio show, "Dr. Ruthless." *Id.*, 656.

The district court granted preliminary relief on the ground that the plaintiffs would suffer irreparable harm if COPA were not enjoined, and that the government was not likely to "meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors" to expression that could fall within the "harmful to minors" definition. Cert. App. 93a, 95a. Quoting *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), the court stated that Congress clearly has a compelling interest in shielding minors "from materials that are not obscene by adult standards"; but it also noted that "perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection." Cert. App. 90a, 97a.

The court of appeals affirmed on different grounds. It found that COPA was likely unconstitutional because of its reliance on "'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." Cert.App. 21a. The contem-

porary community standards test is fatally overbroad, the circuit ruled, because the Internet is not "geographically constrained," and Web publishers cannot readily identify or control the locales from which readers and viewers may access their communications. In consequence, Internet speakers will be forced to self-censor to meet the standards of "'the most restrictive community.'" *Id.*, 24a, quoting *Reno*, 521 U.S. at 877-78.

The court of appeals also noted the age-related overbreadth of COPA -- that is, the restrictions that the law imposes on older minors in the presumed interest of protecting younger ones. To avoid liability, the court said, Web publishers would either have to self-censor "severely" or implement an age verification system behind which "vast amounts of material" would be hidden. Such a system

> would completely bar access to those materials to all minors under seventeen – even if the material would not otherwise have been deemed "harmful" to them in their respective geographic communities.

Id., 24a-25a.

SUMMARY OF ARGUMENT

I. Sexuality experts agree that there is no empirical basis to believe that minors are harmed by exposure to sexually explicit words or images. Therefore, the government has not established a compelling state interest that would justify COPA. Little research has been done on minors' exposure to pornography, and what research exists does not suggest psychological harm. Even studies of the effects of mainstream entertainment with sexual content on minors' attitudes and behavior have been inconclusive. In one of the rare cases in which expert testimony was actually taken on

this issue, the three-judge court in *Playboy Entertainment Group v. United States*, 30 F. Supp.2d 702 (D.Del. 1998), aff'd, 529 U.S. 803 (2000), found no evidence of harm to minors should they happen upon (or deliberately seek out) sexually explicit cable television programming.

II. The government's argument that COPA is necessary because pornography does not provide children "with a normal sexual perspective" and "impairs their moral development" is not an acceptable basis for a criminal censorship law. In the absence of empirical proof of harm, the government mistakenly assumes the power to impose its sexual and moral viewpoint on minors of all ages, as well as on a vast array of Web publishers. Although *Ginsberg v. New York* upheld a "harmful to minors" law based largely on legislators' asserted concern with the "moral development of youth," *Ginsberg* applied only a deferential rational-basis test to the New York law. Under the proper, compelling state interest test that all parties acknowledge applies in this case, the viewpoint-discriminatory argument that COPA is justified because of governmental concerns about minors' "sexual perspective" must fail.

III. COPA is void for vagueness because there is no way to identify what words or images would be considered sufficiently prurient, offensive, and lacking in serious value for minors to violate the law in any particular community. As the record shows, there is no clear dividing line in contemporary culture between pornography, which the government says is prohibited by COPA, and other sexually explicit expression that could be considered prurient, offensive, and without serious value for minors. This problem is exacerbated by the wide range of ages and maturity levels covered by the law. What is patently offensive, appeals to a prurient interest, or lacks serious value for a 6 year-old is far different from what is offensive, prurient, or lacking in value for a

teenager on the verge of adulthood. And to construe COPA to apply only to expression that is thought to lack serious value for a "a legitimate minority of older minors," as the government suggests, would both eviscerate the law and make it virtually indistinguishable from the obscenity standard that applies to adults.

ARGUMENT

I THERE IS NO EMPIRICAL BASIS TO BELIEVE THAT MINORS ARE HARMED BY EXPOSURE TO SEXUALLY EXPLICIT WORDS OR IMAGES

It is so often assumed that minors are harmed by exposure to "patently offensive" sexual words, ideas, or images that political leaders and even courts rarely investigate or analyze the assumption. In fact, scholars and educators in the field of sexuality generally agree that there is no empirical basis to believe explicit sexual material, including pornography, causes psychological harm except perhaps in isolated cases where a young person has already been taught to be ashamed or guilt-ridden about sexual matters.

There is no body of scientific evidence establishing that minors are harmed by reading or viewing pornography. As 16 experts explained in an *amici curiae* brief to this Court in *United States v. Playboy Entertainment Group*, "most scholars in the field of sexuality agree that there is no basis to believe sexually explicit words or images ... in and of themselves cause psychological harm to the great majority of young people."[2] As Professor Pepper Schwartz recently told

[2] Brief *Amici Curiae* of Sexuality Scholars, Researchers, Educators and Therapists in Support of Appellee in *United States v. Playboy Entertainment Group*, No. 98-1682 (Oct. Term 1998), 8; see also Testimony of Jeffrey McIntyre of the American Psychological Association to the Nat'l Research Council, Nat'l Academy of Sciences, Computer Science and Telecomm'ns Bd., Committee to Study Tools and Strategies for Protecting Kids From Pornography and Their Applicability to Other Inappropriate Internet Content (hereafter, "Nat'l Research Council") (Oct. 18, 2000) ("the state of psychological research in the area of children and exposure to pornography is limited").

the National Research Council's Committee "to Study Tools and Strategies for Protecting Kids From Pornography and Their Applicability to Other Inappropriate Internet Content," "there is no scientific evidence that explicit pictures -- however distasteful and disturbing -- cause developmental damage to a young person's sexuality or personality."[3]

In 1986, the Surgeon General's Workshop on Pornography and Public Health concluded that there is no scientific basis to believe that minors are adversely affected by pornography. Indeed, it noted that many psychologists believe young children are unaffected by pornography because they lack "the cognitive or emotional capacities needed to comprehend it." In the end, these experts said, "it is really rather difficult to say much definitive about the possible effects of exposure to pornography on children."[4] The more widely publicized majority report that same year of the Attorney General's Commission on Pornography (the Meese Commission) did not disagree. The Meese Commission acknow-

[3] Testimony of Dr. Pepper Schwartz to the Nat'l Research Council (Mar. 7-9, 2001).

[4] Edward Mulvey & Jeffrey Haugaard, *Surgeon General's Workshop on Pornography and Public Health* (Washington, DC: Dep't of HHS, June 22-24, 1986) (manuscript ed.), 61-62.

ledged that its concerns about minors' access to pornography were based on morality, not science.[5]

In the *Playboy Entertainment* case, expert witnesses for both the government and Playboy testified that there is no empirical body of evidence of harm to minors from exposure to pornography. Dr. Richard Green, founding president of the International Academy of Sex Research, testified that none of the available literature – including comparisons of the amount of erotica available in different countries, studies of sex offenders, laboratory experiments on pornography and violence, clinical experience worldwide, and research on people who as children had witnessed the "primal scene" of sexual intercourse – supports the notion that exposure to sexual explicitness is psychologically harmful to youth. In 25 years of clinical practice, Dr. Green had not encountered psychological problems stemming from minors' viewing pornography.[6]

The government in *Playboy Entertainment* initially attempted to establish harm to minors by offering testimony from the director of a clinic for abused children. The three-judge trial court rejected this testimony as weak, anecdotal,

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[5] Attorney General's Commission on Pornography, *Final Report* 303 (Washington, DC: Gov't Printing Office, 1986) ("[t]o a number of us, the most important harms must be seen in moral terms. ... Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm").

[6] Transcript, *Playboy Entertainment Group v. United States*, No. 96-94 (D. Del. Mar. 5, 1998), 361, 365-67, 397.

and "possibly misleading."[7] Later, the government presented a new expert witness, Dr. Elissa Benedek, who opined that sexually explicit television might produce an assortment of harmful effects but acknowledged that she knew of no scientific literature or clinical studies supporting her belief, and that in her 30 years of psychiatric practice, nobody had come to her with a complaint about sexual images.[8]

The judges were unimpressed with Dr. Benedek's opinion. "We are troubled," they wrote, "by the absence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children." *Playboy Entertainment*, 30 F. Supp.2d at 716.

Although there is no body of empirical research demonstrating harm to minors from reading or viewing pornography, some studies have explored relationships between youngsters' attitudes or behavior and their viewing of mainstream media with sexual content. These studies have limited relevance to pornography, which is a markedly different genre from mainstream entertainment. More important, however, the studies have not demonstrated harmful effects.

For example, an experiment in 1980 asked 75 adolescent girls, half of them pregnant, about their television viewing habits. Overall, the pregnant ones watched more TV soap operas and were somewhat less likely to think that their favorite characters would use contraceptives. But as the

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[7] *Playboy Entertainment Group v. United States*, 945 F. Supp. 772, 786 n. 25 (D. Del. 1996), aff'd mem., 520 U.S. 1141 (1997).

[8] *Playboy* Transcript, 445-81 (Mar. 5, 1998); see *Playboy Entertainment Group*, 30 F. Supp.2d at 710-11.

authors said, it is "difficult to know if television portrayals are encouraging adolescents to be unrealistic about sexual relationships [that is, not using contraceptives], or if unrealistic adolescents identify with the glamorized TV portrayals."[9] Similarly, a 1991 study found that of 391 junior high school students, those who watched sexier TV shows were more likely to have become sexually active in the preceding year. Although "having had intercourse appeared to be related to seeking sexual content on television," the researchers were "unable to determine which came first – sexual intercourse or a proclivity for viewing sexual activity on television."[10]

Indeed, a third variable such as sexual precocity may account for any correlation between sexual activity and viewing of sexually oriented TV programming. Psychologist Jeffrey Arnett, documenting a correlation between adolescents' reckless conduct and preference for violent music, found just such an independent factor – "sensation seeking"-- to account for both the preference and the conduct. Arnett added that "adolescents who like heavy metal music listen to it especially when they are angry and that the music has the

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[9] Charles Corder-Bolz, "Television and Adolescents' Sexual Behavior," 3 *Sex Educ. Coal'n News* 3, 5 (1981).

[10] Jane Brown & Susan Newcomer, "Television Viewing and Adolescents' Sexual Behavior," 21 *J. of Homosexuality* 77, 84, 88 (1991); see also *Risking the Future - Adolescent Sexuality, Pregnancy, and Child-bearing* (Cheryl Haynes, ed.) (Washington DC: Nat'l Academy Press, 1987), 249 (noting that no study "has convincingly linked program content and exposure to adolescent sexual attitudes and behavior"); American Academy of Pediatrics, "Children, Adolescents, and Television," 96 *Pediatrics* 786 (1995) ("there is no clear documentation" that the relationship between TV viewing and sexual activity "is causal").

effect of calming them down and dissipating their anger."[11]

Other correlational studies have found inverse relationships between youthful exposure to pornography and sex offending. That is, sex offenders, both adolescent and adult, generally have less, not more, exposure to pornography as youths.[12] Based on these correlations, some experts have suggested that sex offending is causally related not to youthful exposure to sexually explicit material but to its opposite: youthful repression, conflict, and guilt.[13] Indeed, explicit

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[11] Jeffrey Arnett, "The Soundtrack of Restlessness - Musical Preferences and Reckless Behavior Among Adolescents," 7 *J. Adol. Rsrch* 313, 328 (1992); see also Lawrence Kurdek, "Gender differences in the psychological symptomatology and coping strategies of young adolescents," 7 *J. Early Adol.* 395 (1987) (notlng that heavy metal music is useful to some adolescents in purging anger).

[12] Judith Becker & Robert Stein, "Is Sexual Erotica Associated with Sexual Deviance in Adolescent Males?" 14 *Int'l J. Law & Psychiatry* 85 (1991); Milton Diamond & Ayako Uchiyama, "Pornography, Rape, and Sex Crimes in Japan," 22 *Int'l J. Law & Psychiatry* 1, 15-19 (1999); Paul Gebhard *et al.*, *Sex Offenders* 670-78 (NY: Harper & Row, 1965); Ira & Harriet Reiss, *Solving America's Sexual Crisis* 61-83, 147-51 (Amherst, NY: Prometheus Books, 1997); Michael Goldstein & Harold Kant, *Pornography and Sexual Deviance* 139-44, 147 (Berkeley: U. Cal. Press, 1973) (evidence "suggests that a reasonable degree of exposure to erotica, particularly during adolescence, reflects a high degree of sexual interest and curiosity that correlates with adult patterns of acceptable heterosexual practice").

[13] Diamond & Uchiyama, *supra* n. 12; Reiss & Reiss, *supra* n. 12; Kathryn Kelley *et al.*, "Three Faces of Sexual Explicitness - the Good, the Bad, and the Useful," in *Pornography - Research Advances and Policy Considerations* 67 (Dolf Zillmann &

materials have been used therapeutically in treating sexually delinquent teenagers and pre-adolescents, and in family therapy generally.[14]

A recent study by Professor Joanne Cantor and her colleagues tried to assess the effects on minors of sexual material by asking college students for their memories of TV shows or movies "depicting sex or sexual issues" that they had seen as children or adolescents. The researchers found no clear, consistent effects. About half of the subjects who viewed "sexual content" as adolescents or earlier "evaluated the experience as both positive and negative ... Younger children's responses were significantly more likely to be characterized by interest or confusion; those of older children were significantly more likely to be characterized by disgust or anger."[15] None of the results suggested serious or permanent psychological harm.

Jennings Bryant, eds.) (Hillsdale, NJ: Lawrence Erlbaum, 1989).

[14] William Seabloom *et al.*, "A 15 to 23 Year Retrospective Study of Participants in Personal/Social Awareness, An Intensive Outpatient Treatment Program for Adolescents in Sexual Crisis," paper presented to the 33d Annual Conference of the American Ass'n of Sex Educators, Counselors and Therapists (May 2-6, 2001); William Seabloom, "Sexual Fantasy as a Positive Aid in the Treatment of the Sex Offender," paper presented to the Annual Meeting of the Society for the Scientific Study of Sexuality (Sept. 19–22, 1985); Pearl & Lois Rosenberg, "A Group Experience in Sex Education for the Family," 26 *Int'l J. of Group Psychotherapy* 236 (1976).

[15] Joanne Cantor, Abstract - "Autobiographical Memories of Exposure to Sexual Media Content," paper presented to the Society for Research in Child Development Conference, Minneapolis (Apr. 20, 2001).

In the final analysis, it is unclear whether quantitative social science techniques -- correlational studies, laboratory experiments -- can ever identify, with any degree of certainty, the precise causes of "harmful" attitudes or behavior in an area as complex and multi-faceted as human sexuality. Certainly, anecdotes, or isolated clinical reports, do not amount to proof of harm sufficient to satisfy the government's burden of demonstrating a compelling need for COPA.[16]

In the absence of evidence, it might be argued that psychological harm from "patently offensive" material should be presumed, at least for young children. Most sexually explicit material *is* obviously age-inappropriate for young children, and might be confusing and troubling to some of them. But such confusion does not amount to serious psychological harm of the magnitude that would justify a criminal censorship law such as COPA. At the end of the day, problems of confusion about sexuality are best dealt with by parents, counselors, and educators.

II COPA IS NOT JUSTIFIED BY THE GOVERNMENT'S ASSERTION THAT PORNOGRAPHY LACKS "A NORMAL SEXUAL PERSI ECTIVE"

Recognizing the absence of evidence that sexual expression is psychologically harmful to minors, the government argues that suppression is nevertheless necessary to promote youngsters' "moral development" and "normal sexual perspective." Pet. Br., 3, 17 (typescript). The argument is view-

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[16] Identifiable harm to minors – for example, from sexual predators on the Internet – is not caused by pornography. On the contrary, it is usually facilitated by non-pornographic solicitations in chat rooms and the like, and thus will not be prevented by COPA.

point-discriminatory, arguably mistaken, and in any event insufficient to justify a criminal censorship law under the strict scrutiny standard that the government concedes is required in this case. *Id.*, 23.

First, the government's effort to suppress speech because of disagreement with its perceived message -- here, an "abnormal" sexual perspective -- is the essence of viewpoint discrimination. As this Court held in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995), and reiterated in *Good News Club v. Milford Central School*, 121 S.Ct. 2093, 2100 (2001), discrimination against a religious perspective concerning what is proper or moral conduct is viewpoint-based. See also *Kingsley Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684, 689 (1959) (viewpoint that adultery may be proper behavior); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986) (discrimination against viewpoint that subordinates women in sexual situations). Because the First Amendment severely limits the government's power to suppress disfavored perspectives on political, social, or sexual matters, viewpoint discrimination is the most suspect form of governmental restriction on speech. *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992).

Second, the government does not specify how it arrived at its conclusion that the expression targeted by COPA lacks a normal sexual perspective and impairs the moral development of adolescents and children. Moral and cultural attitudes toward sexuality vary widely across the population of American parents and educators. Many believe that a knowledge of sexual facts (even the seamier ones), and an affirmative attitude toward sexual pleasure, are positive, normal, and moral. Therapists use explicit media in treating sexual problems among youths as well as adults. Many experts believe that messages of disapproval and taboo are psychologically harmful, and have found lack of sexual fantasizing, not its opposite, to correlate with sexual dysfunction.[17] Given that it is not even clear what different communities will find prurient, patently offensive, and without serious value for minors,[18] it can hardly be said that all of this potentially banned material is immoral or conveys an "abnormal" perspective.

As Professor Pepper Schwartz explained to the National Research Council, explicit sexual information can help empower youngsters to "navigate the rocky shoals of adolescent sexuality." If minors are "comfortable with sexuality"

> because they understand it and have access to images that satisfy a lot of their curiosity, I think there is every reason to believe that the random images of more bizarre sexuality will not be elemental in the formation of their sexual lives.[19]

Professor Schwartz's testimony suggests that education is a more effective, and much less restrictive, means of accomplishing the government's interest in providing youngsters with a "normal sexual perspective" and promoting their moral development than is a censorship law such as COPA.

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[17] E.g., Diamond & Uchiyama, *supra* n. 12; Becker & Stein, *supra* n. 12; Gebhard, *supra* n. 12; Eberhard & Phyllis Kronhausen, *Pornography and the Law* 273-74 (NY: Ballantine, 1959).

[18] See §III, *infra*.

[19] Schwartz testimony, *supra* n. 3; see also *The Surgeon General's Call to Action to Promote Sexual Health and Responsible Sexual Behavior* 10-11 (Washington, DC: U.S. Dept of HHS, 2001) (stressing importance of sexuality education).

The government's generalized concern with moral values may have sufficed in *Ginsberg* to satisfy the rational basis test,[20] but it is not sufficient to establish a compelling state interest, and a criminal law is certainly not the least constitutionally burdensome means of addressing the government's concern. In a society that embraces a wide range of views and attitudes about sexuality, in which most high school students are sexually active,[21] and in which the sexual activities of a recent President were the subject of an explicit report to the United States Senate, the government cannot justify imposing its viewpoint on sexual morality by suppressing any sexual material that one or another local community may deem patently offensive, prurient, and lacking in serious value for minors.[22] Even assuming that promoting minors' moral development is a compelling state interest and that COPA would advance that interest, there are less restrictive and more effective ways of accomplishing it, through comprehensive sexuality and media-literacy education.

III COPA IS VOID FOR VAGUENESS

Even if the government had the power to suppress disfavored viewpoints about sexuality in the interest of minors' moral development, COPA is unconstitutionally vague. There is no way for publishers to know what words or images will be considered prurient, patently offensive, and lacking in serious value for minors of any particular age. This is so for three reasons.

First, with no geographic community specified, and with Web materials accessible all over the world, publishers cannot know what community standard of offensiveness and prurience will apply. In contrast to the situation in *Sable*,

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[20] *Ginsberg*, after recognizing the absence of empirical evidence of harm to minors, noted a psychiatric theory of identity formation as a justification for upholding New York's law. The psychiatrist in question conceded that "'the reading of pornography [is] unlikely to be per se harmful,'" but theorized that the *permitting* of the reading of pornography might be "'potentially destructive. ... The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification process.'" 390 U.S. at 642 n. 10, quoting Willard Gaylin, "The Prickly Problems of Pornography," 77 *Yale L.J.* 579, 592-94 (1968). This psychiatric theory, along with the New York legislature's concern with "the ethical and moral development of youth," was enough to satisfy *Ginsberg*'s rational basis test. But whatever the validity of Dr. Gaylin's notion that a message of disapproval is important for sexual development, it is both dubious as a constitutional matter, see *Carey v. Population Serv. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring), and too speculative to satisfy strict scrutiny. See also Marjorie Heins, *Not in Front of the Children: "Indecency," Censorship, and the Innocence of Youth* 71-74 (NY: Hill & Wang, 2001).

[21] See Schwartz Testimony, *supra* n. 3; Centers for Disease Control, "Current Trends: Premarital Sexual Experience Among Adolescent Women" 39(51/52) *Morbidity & Mortality Wkly Rep.* 929 (Jan. 4, 1991); Freya Sonenstein *et al.*, "Sexual Activity, Condom Use and AIDS Awareness Among Adolescent Males," 21(4) *Fam. Plng Persp.* 152 (1989); *Surgeon General's Call to Action*, *supra* n. 19, 4 (noting high level of adolescent pregnancy).

[22] In *Sable Communications*, 452 U.S. at 126, and *Reno v. ACLU*, 521 U.S. at 863 n. 30, this Court assumed that government has a strong interest in shielding minors "from the influence of literature that is not obscene by adult standards," but it did not rely on evidence or explain the nature of the influence. Certainly, the Court did not say that government has a compelling interest in suppressing messages it deems to be sexually immoral or reflective of an "abnormal" sexual perspective.

therefore, speakers cannot tailor their expression to the standards of the community likely to receive it. COPA's reliance on "contemporary community standards" is thus not only overbroad, as the court of appeals ruled, but vague as well.

Second, there is no clear dividing line in contemporary culture between the "pornography" that the government insists is COPA's main target, and other sexually oriented art, literature, or information that a local community might find prurient, patently offensive, and lacking in serious value for minors. Indeed, "pornography" itself is a word whose meaning varies depending on the viewpoint of the person using it. COPA, which employs even more open-ended terms, will mean very different things to decisionmakers in different communities, some of which might well find Susie Bright's "Sexpert" column from Salon. com, information about sex toys and masturbation from the Sexual Health Network, or advice from Dr. Ruthless to be "harmful to minors." See also the many examples in the Brief of *Amici Curiae* American Society of Journalists and Authors *et al.*, 12-18.

Sexuality is so pervasive in contemporary culture that any dividing line between "harmful to minors" material and non-"offensive" or non-"prurient" sexual expression is amorphous and shifting. It is questionable, for example, whether the girlie magazines at issue in *Ginsberg* would qualify as "harmful to minors" today. Certainly, it is unclear whether *Playboy* magazine, taken as a whole, is without value for older minors, as the government seems to assume. (*Playboy* contains many non-prurient articles on political and cultural subjects in addition to its images of buxom women.) The distinction between material arousing minors' "prurient," i.e., "shameful or morbid" interests and material arousing only "normal sexual responses," see *Brockett v. Spokane Arcades*, 472 U.S. 491, 498-99 (1985), adds further difficulty for Web speakers in determining what COPA prohibits.

Third, COPA's vagueness is exacerbated by the wide range of ages and maturity levels covered by the law. What is patently offensive, appeals to a shameful or morbid interest in sex, or lacks serious value for a 6 year-old differs substantially from what is offensive, prurient, or lacking in value for a 10, 12, 14, or 16½ year-old. Laws "aimed at protecting children from allegedly harmful expression -- no less than legislation enacted with respect to adults -- must be clearly drawn," with standards "reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *Interstate Circuit v. Dallas*, 390 U.S. 676, 688-89 (1968).

Recognizing this problem of age range, courts in previous cases have narrowed state harmful-to-minors laws to suppress only material considered patently offensive, prurient, and without serious value for "a legitimate minority of normal, older adolescents." *Commonwealth v. American Booksellers' Ass'n*, 236 Va. 168, 177, 372 S.E.2d 618, 624 (1988); see also *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *American Booksellers Ass'n v. Webb*, 919 F.2d 1493, 1504-05 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991). The government takes the same tack in the present case. See Pet. Br., 27, 30. But there is no basis for this drastic rewriting of the law, which, while conceivably saving it from unconstitutional vagueness and overbreadth, would do so by robbing it of effectiveness in advancing Congress's supposedly compelling interest in shielding younger minors from exposure to "abnormal" sexual perspectives. Indeed, the government's interpretation makes COPA indistinguishable from an adult obscenity law, since it is impossible for Web publishers to discern the difference between serious value for a 16½ year-

old and a 17 year-old.[23]

These problems of vagueness are particularly troublesome in a law that imposes criminal penalties. As several justices have recognized, "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Smith v. United States*, 431 U.S. 291, 313 (1977) (Stevens, J, dissenting); see also *McKinney v. Alabama*, 424 U.S. 669, 679 (1976). The problem is magnified by COPA's varying range of ages and community standards.

Finally, of course, vagueness is a matter of greater concern when a law "threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982). As the record in this case amply shows, COPA threatens the First Amendment rights of countless Web publishers and readers, both young and old.[24]

CONCLUSION

Absent empirical proof of harm, the government's desire to convey a message of moral disapproval is not sufficient to justify COPA. It also distracts from truly effective ways to

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[23] Adult obscenity laws of course remain available for the purpose of shielding minors from hardcore pornography.

[24] *Ginsberg* rejected a vagueness challenge to New York's "harmful to minors" law without addressing the heightened First Amendment scrutiny that should apply, or the range of ages for which judges and juries would have to make decisions about offensiveness, value, and prurience. Nor did *Ginsberg* deal with an indeterminate geographical community, or a culture in which explicit sexual material is pervasive.

educate young people about good sexual values and behavior. Particularly given the pervasiveness of sexual ideas and images throughout contemporary culture, and the facility of minors in navigating the Internet, education is likely to be a more effective approach. The court of appeals' judgment should therefore be affirmed.

Respectfully submitted,

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APPENDIX: DESCRIPTION OF *AMICI*

The Society for the Scientific Study of Sexuality (SSSS), founded in 1957, is an international organization of professional sexual scientists dedicated to the advancement of sexual knowledge. The Society publishes *The Journal of Sex Research*, the *Annual Review of Sex Research* and *Sexual Science*, the Society newsletter. The Society sponsors programs to award research excellence and holds an annual meeting and regional conferences to promote interdisciplinary cooperation among researchers, educators, and clinicians.

The Institute for Advanced Study of Human Sexuality, located in San Francisco, is the only fully approved graduate school of sexology in the world. It is trustee of the world's largest collection of erotological materials (more than 3 million books, journals, films, and other artifacts), and provides advanced training for sexuality counselors, therapists, scholars, and educators.

The Sexual Health Network (TSHN), founded in 1996, is an Internet-based, sexuality focused content provider. The Sexual Health Network is dedicated to providing easy access to sexuality information, education, mutual support, counseling, therapy, healthcare products, and other resources for people with disabilities, illness, or natural changes throughout the life cycle and those who love them or care for them.

The American Board of Sexology is a certifying body created by the leading sex educators, sex researchers, and sex therapists in the world, to provide credentialing to professionals in the field as a form of consumer protection. It has established minimum standards of education, time in practice, and a common body of knowledge in the field. The

board, through an additional organization, is a provider for the State of Florida of advanced training in clinical sexology for professional mental health counselors, social workers, and psychologists.

The National Coalition Against Censorship (NCAC), founded in 1974, is an alliance of 51 national nonprofit organizations, including religious, educational, professional, artistic, labor and civil rights groups united in the conviction that freedom of thought, inquiry and expression are indispensible to a healthy democracy. NCAC educates the public and policymakers about threats to free expression and works to create a more hospitable environment for laws, decisions, and policies protective of free speech and democratic values. The positions advocated by the National Coalition Against Censorship in this brief do not necessarily reflect the positions of each of its participating organizations.

The First Amendment Project (FAP) is a nonprofit, public interest law firm and advocacy organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.